

BUILDING INDUSTRY ASSOCIATION OF WASHINGTON

Washington State Energy Code

Overview

- Changes over the last 20 years in residential construction have produced a significant drop in energy consumption. Improvements include a tighter thermal envelop, more energy efficient appliances and windows, better lighting and passive solar design.
- Washington already has one of the most stringent energy codes in the nation.
- Proponents for harsh energy code amendments want to decrease energy consumption 30 percent by 2010, rather than follow the legislature's bill making incremental changes starting in 2013.

Newer Homes Are More Energy Efficient Than Ever

- Builders currently construct energy efficient homes and support reasonable requirements to improve energy efficiency.
- Homes built today are significantly more energy efficient than those built before 1990 and account for only a small percentage of total energy consumption.

Older Homes Are Less Efficient

- Seventy-two percent of homes in Washington State were built before 1990 and the enactment of the Washington State Energy Code (WSEC). Code changes should focus on updating older homes, not already energy efficient new homes.
- According to the U.S. Department of Energy, an owner of a pre-1990 built home can spend \$2500 on energy upgrades and reduce energy use by 30 percent.

WSEC Proposal Costs

- People who actually build homes estimate the WSEC proposal will cost \$11,000 to \$22,500. The proponents' estimates are substantially lower, but are not based on real world situations, only theoretical costs. And no one who figured these costs is a home builder.

Fewer People Will Be Able To Afford A Newer, More Energy Efficient Home

- According to a statistical analysis in Washington's nine largest metropolitan areas, a \$5,000 increase in the cost of a home prices 24,000 potential homebuyers out of the market.

Economy

- With the weak economy and sagging home building industry, adding thousands of dollars to the price of a new home doesn't make sense.
- Out of the 20 largest cities in the country, Seattle has the largest number of bad construction loans. These troubled assets are lowering lot and land prices as banks try to unload them, often at a loss.
- The State Building Code Council failed to conduct a thorough and accurate small business economic impact analysis.

Adoption of the International Energy Conservation Code (IECC)

- The SBCC has stated it will adopt the IECC by 2012. This means that builders face substantial energy code changes twice within the span of two to three years.
- The SBCC should delay implementation of existing energy code proposals until adoption of the IECC.



BUILDING INDUSTRY
ASSOCIATION OF WASHINGTON
CHAMPIONS OF AFFORDABLE HOUSING

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October 5, 2009

Members, Washington State Building Code Council
Post Office Box 42525
Olympia, Washington 98504-2525

Dear Honorable Council Members:

The Building Industry Association of Washington (BIAW) is the largest trade association in the state representing over 11,600 members involved in various aspects of the homebuilding industry, including air conditioning and heating contractors and distributors. BIAW is very concerned with the provisions in the proposed changes to the state energy code which will have severe implications on the construction industry.

The purpose of this letter is to bring your immediate attention to a legal issue that has not been addressed by the Council or the TAG in the deliberations regarding the proposed changes to the state energy code. BIAW believes the Council is in danger of violating the federal pre-emption doctrine if the proposed changes to Chapter 9 are adopted.

Federal pre-emption of energy efficiency and use standards

By way of background, the energy efficiency and energy use standards for certain residential heating, ventilation and air conditioning products are governed by the Energy Policy and Conservation Act of 1975 ("EPCA"), 42 U.S.C. § 6291 *et seq.* EPCA has been substantially amended twice, in 1987 and 1992, and sets forth direction for the federal Department of Energy ("DOE") to prescribe federal industry-wide baseline standards for 13 "covered products." DOE is also tasked with periodically updating those standards. The list of "covered products" includes the following residential appliances and equipment:

- Central air conditioners and heat pumps (42 U.S.C. § 6295(d));
- Water heaters, pool heaters and direct heating equipment (42 U.S.C. § 6295(e));
- Furnaces and boilers (42 U.S.C. § 6295(f)).

EPCA contains express pre-emption provisions that prohibit (with certain limited exceptions) any "State regulation, or revision thereof, concerning the energy efficiency, energy use, or water use of the covered products. . ." 42 U.S.C. § 6297(c).

Congress adopted EPCA, and its subsequent amendments, in order to create stability for manufacturers and distributors. The Congressional record is full examples of this clear

intent. In fact, the pre-emption provisions were broadly framed because Congress wanted to “end an era of confusion and uncertainty” for the industry and “protect the appliance industry from having to comply with a patchwork of numerous conflicting State requirements.” H.R. Rep. No. 100-11 at 24, 30. Congress recognized that such a “patchwork” would “increasingly complicate their design, production and marketing plans.” S. Rep. No. 100-6 at 4 (1987). Congress intended that 42 U.S.C. § 6297 would “pre-empt[] state law under most circumstances.” H.R. Rep. 100-11 at 19.

Pursuant to the requirements of EPCA, DOE has the responsibility for periodic updates of these standards. DOE updated the federal standards for air conditioners and heat pumps in 2001, which became effective in 2006. (See 10 C.F.R. § 430.32(c)(2)). Standards for residential furnaces and boilers were revised in 2007 (see Fed. Reg. 65136) and will be effective in 2012 and 2015.

Federal law outlines two routes for a state or local jurisdiction to qualify for an exception to federal pre-emption. First, DOE can grant a waiver of pre-emption to a state if the state appeals to the Secretary of DOE and the Secretary finds that the state regulation is needed to meet some “unusual or compelling state or local energy or water interests,” that are “substantially different in nature or magnitude than those prevailing in the United States generally.” 42 U.S.C. § 6297(d). To our knowledge, the SBCC has not asked DOE for a waiver of pre-emption.

The second option to avoid pre-emption is commonly referred to the “building code” exception and is intended to allow state or local governments to pursue “performance-based building code approaches.” 42 U.S.C. § 6297(f); H.R. No. 100-11 at 39. In order to qualify for this exception, the state or local code must meet a strict 7-part test, enumerated in 42 U.S.C. § 6297(f)(3). This exception applies only to new construction, not to renovations.

The Albuquerque case

A recent federal court case explored these requirements in detail and concluded that the City of Albuquerque’s proposed energy code changes appeared to be in violation of federal pre-emption. In that case, the United States District Court for the District of New Mexico granted an injunction in a case where local and regional distributors of heating, ventilation, air conditioning and water heating products, as well as national manufacturers, challenged the City of Albuquerque’s proposed energy efficiency regulations. At issue in the Albuquerque case was a new energy conservation code as well as a high performance building ordinance. The Court found that the codes violated several of the provisions in the 7-part test, and therefore, were not exempted from the pre-emption law.

The Court concluded that the distributors, contractors and manufacturers met the stringent test required to qualify for injunctive relief, including whether there will be “irreparable injury” to the contractors, distributors and manufacturers and whether there

is a substantial likelihood that the moving party will eventually prevail on the merits of the case. The court stopped the city's proposed codes from moving forward.

The court noted that “[t]he building code exception was intended to give states flexibility, but this flexibility was ‘limited’ to ‘ensure that performance-based codes cannot expressly or effectively require the installation of covered products whose efficiencies exceed. . . the applicable federal standard’.” (See *The Air Conditioning, Heating and Refrigeration Institute et al. v. City of Albuquerque*, Civ. No. 08-633, Memorandum Opinion and Order (“Order”), October 3, 2008, quoting H.R. Rep. 100-11 at 26 (emphasis in Opinion and Order)).

The City argued (unsuccessfully) that they were not in violation of pre-emption because the prescriptive standards within the Code are optional avenues for compliance, not mandatory requirements, and the EPCA pre-emption provision only applies to mandatory requirements. The court rejected this argument, finding “no support for the novel proposition that the inclusion of one or more alternatives for compliance in a regulation keeps each of the alternatives from being considered a regulation.” Order at 14.

In the Albuquerque case, the manufacturers, contractors and distributors presented evidence that the performance-based alternatives outlined in the City's proposed codes – as a practical matter – could not be met with products that met, but didn't exceed, the federal standards. The Court, like the Congress, was concerned with the practical effect of the local codes: “A building code that effectively requires the installation of products that exceed federal energy standards cannot satisfy [42 U.S.C. § 6297(f)(3)(B)].” Order at 18. This statement echoes what Congress intended: The building code exception was intended to “ensure that performance-based codes cannot expressly or effectively require the installation of covered products whose efficiencies exceed [] the applicable federal standard.” H.R. Rep. 100-11 at 26.

The Albuquerque Court also found that the City did not meet the “baseline building design” portion of the 7-part test as outlined in 42 U.S.C. § 6297(f)(3)(D). This requirement says that if the code in question uses one or more baseline building design against which plans are evaluated, such baseline designs must be based on products that meet but do not exceed federal standards. The Court stated clearly: “The fact that there are alternative paths to compliance that do not utilize a baseline design does not exempt a baseline building design alternative from the requirement that it be based on products meeting federal efficiency standards. The Court believes that the intent of this requirement was to ensure that baseline building designs, even if they are one of several options in a building code, be based on products that meet but do not exceed federal energy efficiency standards. . .” Order at 19-20 (emphasis added).

Conclusion

BIAW believes that many of the same arguments can be applied to the proposals in Chapter 9 that are under consideration by the Council. The Council should be aware that just as in the Albuquerque case, contractors, manufacturers and distributors of HVAC

products and water heaters in Washington state will sustain economic loss as a result of the proposed changes in Chapter 9. These contractors and distributors have relied on federal energy efficiency and use standards in making their capital investments – capital that will be lost upon the adoption of these state standards. In addition, increasing the efficiency standards of products leads to increased prices of these products and increased installation costs, which translates into higher priced homes for Washington consumers.

Based on a thorough review of (1) the facts presented in the Chapter 9 proposals, (2) the federal statute at issue and (3) the law as applied in the Albuquerque case, we believe the Council will open itself up to legal challenges in federal court if it adopts the proposals set forth in Chapter 9.

Sincerely,

A handwritten signature in black ink, reading "Julie Nichols". The signature is fluid and cursive, with a long horizontal stroke extending from the end of the name.

Julie Nichols
Legal Counsel